

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

LYNN OLSEN, d.b.a., OLSEN  
AGRIPRISES,

Plaintiff,

and

CARR FARMS LLC,

Plaintiff,

v.

UNITES STATES OF AMERICA, et al.,

Defendants.

Nos. CV-08-5012-FVS  
CV-08-5013-FVS

ORDER DENYING PLAINTIFFS'  
MOTIONS FOR PARTIAL SUMMARY  
JUDGMENT

**THIS MATTER** came before the Court on Plaintiffs' motions for partial summary judgment on the issue of whether they were overpaid on their 2001 claims. Plaintiffs are each represented by John G. Schultz, James A. McGurk, Kevin J. Brosch and Andrea J. Clare. Defendant is represented by Rolf H. Tangvald.

Following the June 23, 2009, initial hearing on the motions, the Court ordered additional oral argument. Additional oral argument was heard on July 21, 2009. Following oral argument, the Court requested that Defendant reduce its arguments to writing in the form of a

1 supplemental brief and that Plaintiffs have an opportunity to respond  
2 to the supplemental brief. The supplemental briefing and responses  
3 were filed in August. The matter is now before the Court.

#### 4 **BACKGROUND**

5 Both Plaintiffs, Lynn Olsen ("Olsen") and Carr Farms, LLC  
6 ("Carr"), owned and grew crops in 2001 and 2002. Both Plaintiffs  
7 purchased crop insurance policies from American Growers Insurance  
8 Company ("AGIC") to protect against risks of loss with respect to  
9 their 2001 and 2002 crops. Pursuant to the Federal Crop Insurance  
10 Act, 7 U.S.C. §§ 1501 et seq., the Federal Crop Insurance Corporation  
11 ("FCIC") reinsured Plaintiffs' policies. FCIC's reinsurance program  
12 is administered by the Risk Management Agency ("RMA"). 7 U.S.C. §  
13 6933.

14 In 2001 and 2002, both Plaintiffs suffered crop losses and sought  
15 recovery under the policies. AGIC paid Olsen \$1,671,633 on his claims  
16 for the 2001 crop year, but denied his claims for an additional  
17 \$447,114 for his 2001 crop and denied his entire claim of \$2,608,669  
18 for his 2002 crop. AGIC paid Carr \$2,179,995 on claims for the 2001  
19 crop year, but denied the entire claim of \$2,345,336 for the 2002  
20 crop.

21 Plaintiffs disagreed with AGIC's determinations of the claims and  
22 attempted to challenge the determinations by proceeding to  
23 arbitration. After the arbitration proceedings were initiated, AGIC  
24 counterclaimed to recover portions of the payments which it had  
25 previously made to Plaintiffs. On February 28, 2005, before the  
26 arbitration could go forward, the State of Nebraska liquidated AGIC.

1 The Order of Liquidation provided that, "no actions at law or in  
2 equity or in arbitration, whether in this state or elsewhere, may be  
3 brought against AGIC, or its Liquidator, nor shall any existing  
4 actions be maintained or further presented after issuance of this  
5 Order of Liquidation . . . ."

6 Notwithstanding the foregoing, Plaintiffs continued to proceed  
7 with their arbitrations. FCIC advised that it did not recognize the  
8 authority of an arbitrator, did not intend to arbitrate the matters,  
9 and would not be bound by arbitration decisions. On September 20,  
10 2005, and August 22, 2005, arbitration hearings were held in the Olsen  
11 and Carr cases. The arbitrator for the Olsen proceeding substituted  
12 FCIC for AGIC. The arbitrator ultimately awarded Olsen \$477,114 for  
13 the 2001 crop year and \$2,608,699 for the 2002 crop year. The  
14 arbitrator appointed for the Carr arbitration proceeded against AGIC.  
15 The arbitrator ultimately awarded Carr \$2,969,341.

16 FCIC refused to acknowledge the validity of either award.  
17 Plaintiffs thereafter filed an action to enforce the arbitration  
18 awards before this Court. On March 10, 2008, this Court vacated the  
19 arbitration awards finding the arbitrators did not have jurisdiction  
20 over FCIC to conduct the arbitrations. (*Olsen, et al. v. United*  
21 *States of America*, 06-CV-5020-FVS).

22 In addition to proceeding with the arbitration process,  
23 Plaintiffs also submitted their claims to FCIC for review. On April  
24 5, 2007, FCIC issued a revised final decision for Olsen indicating he  
25 had been overpaid on his 2001 claim. FCIC issued a final decision on  
26 Carr's claims on May 9, 2007, finding that Carr had also been overpaid

1 on its 2001 claim. Both Plaintiffs filed administrative appeals with  
2 the National Appeals Division ("NAD"). On December 6, 2007, NAD  
3 upheld FCIC's determinations that Olsen was not entitled to indemnity  
4 payments on its 2001 and 2002 crop year claims and that Olsen was  
5 overpaid for crop year 2001. On December 6, 2007, NAD additionally  
6 upheld FCIC's determinations that Carr was not entitled to payments on  
7 its 2001 crop year, had been overpaid for crop year 2001, and was  
8 entitled to only a portion of the 2002 crop year claim. In February  
9 2008, the NAD Director upheld NAD's December 6, 2007 determinations  
10 pertaining to Plaintiffs. Each Plaintiff thereafter initiated the  
11 instant actions for judicial review challenging the agency's decisions  
12 under the Administrative Procedures Act ("APA").

13 On February 20, 2009, each Plaintiff filed a motion for partial  
14 summary judgment relating to the 2001 crop year for which alleged  
15 overpayments were made. The Court heard oral argument on the motions  
16 on June 23, 2009. Following oral argument, the Court requested  
17 additional oral argument on three specific areas: Paragraph 5(f) of  
18 the insurance policies, Mandatory Amendment No. 5 to the 1998 Standard  
19 Reinsurance Agreement, and how NAD otherwise had jurisdiction if the  
20 assignment agreement is not considered. With respect to these three  
21 issues, additional oral argument was heard on July 21, 2009.  
22 Following oral argument, the Court requested that Defendant reduce its  
23 arguments to writing and that Plaintiffs have an opportunity to  
24 respond. Defendant's supplemental brief was filed on August 3, 2009.  
25 Plaintiffs' responses were filed on August 17, 2009.

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## DISCUSSION

### I. Standard of Review

This Court's review of administrative findings is governed by the APA, 5 U.S.C. §§ 701 *et seq.* Under the APA, an agency action may be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The Court must determine whether the agency "considered the relevant factors and articulated a rational connection between the facts found and the choices made." *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1206 (9th Cir. 2004) (citation omitted). The Court is not empowered to substitute its judgment for that of the agency. Rather, the Court must consider whether the decision was based on consideration of the relevant factors and whether there has been a clear error of judgment. *Old Republic Ins. Co. v. Federal Crop Ins. Corp.*, 947 F.2d 269, 282 (7th Cir. 1991).

However, the issue presented in the motions currently before the Court involve Defendant's jurisdiction, an issue of law, not fact. The Court is thus not required to review the administrative agency's factual determinations. Accordingly, the Court finds that, for purposes of the instant motions, the "arbitrary and capricious" standard of review is not applicable.

### II. Scope of Review

Challenges that an agency exceeds its statutory authority are questions of law and thereby subject to *de novo* review. *Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 770 (9th Cir. 2006); *see also, Bonneville Power Admin. v. F.E.R.C.*, 422 F.3d 908, 914 (9th

1 Cir. 2005) ("We review *de novo* the question of whether an agency has  
2 exceeded its statutory mandate."). "[Courts] review questions of law,  
3 including an agency's determination of its own jurisdiction, *de novo*."  
4 *Reynoso-Cisneros v. Gonzales*, 491 F.3d 1001, 1002 (9th Cir. 2007).

5 On *de novo* review, a district court is able to conduct a much  
6 broader review, considering anew both the legal and factual aspects of  
7 a claim. *Thomas v. Oregon Fruit Products Co.*, 228 F.3d 991, 995 (9th  
8 Cir. 2000). The Ninth Circuit has determined that a district court,  
9 on *de novo* review, may also consider new or supplementary evidence  
10 under certain circumstances. For example, in *Friedrich v. Intel*  
11 *Corp.*, 181 F.3d 1105, 1111 (9th Cir. 1999), the Ninth Circuit found  
12 that a district court, when exercising *de novo* review of an Employee  
13 Retirement Income Security Act ("ERISA") benefits denial, may admit  
14 additional evidence when "'circumstances clearly establish that  
15 additional evidence is necessary to conduct an adequate *de novo* review  
16 of the benefit decision.'" *Friedrich*, 181 F.3d at 1111 (quoting  
17 *Mongeluzo v. Baxter Travenol Long Term Disability Benefit Plan*, 46  
18 F.3d 938, 944 (9th Cir. 1995) (quoting *Quesinberry v. Life Ins. Co. of*  
19 *N. Am.*, 987 F.2d 1017, 1025 (4th Cir. 1993) (en banc))). Also, in  
20 *Huntsinger v. The Shaw Group, Inc.*, 268 Fed.Appx. 518, 520-521 (9th  
21 Cir. 2008), the Ninth Circuit held that a district court did not  
22 exceed the scope of *de novo* review by considering supplementary  
23 evidence as grounds for affirming a plan administrator's decision to  
24 deny a benefits claim.

25 Here, the Court finds the issue presented is a threshold legal  
26 question, an objection to the agency's jurisdiction to review whether

1 Plaintiffs had been overpaid by AGIC on their 2001 claims.  
2 Accordingly, the appropriate standard of review is *de novo*. On *de*  
3 *novo* review, the Court may consider new or supplementary evidence if  
4 the Court finds the circumstances necessitate the introduction of such  
5 evidence for an adequate review. The Court finds that such  
6 circumstances exist in this case. The Court will thus review all  
7 evidence presented, not just the administrative record, in its  
8 consideration of the jurisdictional issue presented in these cases.

### 9 **III. Motions for Partial Summary Judgment**

10 In Plaintiffs' motions for partial summary judgment, Plaintiffs  
11 address only the issue of the alleged overpayments made by AGIC in  
12 2001 and not issues pertaining to the denial of their indemnity claims  
13 for crop years 2001 and 2002. With respect to the overpayment issue,  
14 Plaintiffs argue that (1) FCIC had no legal right to revise claim  
15 determinations made under a private contract of insurance that FCIC  
16 was not a party to; and (2) NAD lacked jurisdiction over the issue of  
17 whether Plaintiffs had been overpaid by AGIC.

#### 18 **A. FCIC's Authority to Revise Claim Determinations**

19 Plaintiffs assert that FCIC was not in privity with Plaintiffs;  
20 therefore, FCIC had no contractual right to seek any overpayments from  
21 Plaintiffs. The policies issued by AGIC to Olsen and Carr were  
22 agreements of insurance exclusively between AGIC and Olsen and Carr.  
23 FCIC was not a party to the private contracts of insurance between  
24 AGIC and Plaintiffs, made no payments to either Plaintiff, and thus  
25 had no right to seek repayment for the amounts AGIC allegedly overpaid  
26 Plaintiffs.

1 Defendant initially responded that Plaintiffs' motions should be  
2 rejected for two reasons. First, Defendant argued that Plaintiffs  
3 have waived such contentions, because Plaintiffs never raised these  
4 issues in the administrative proceedings. Defendant contends that  
5 Plaintiffs cannot raise arguments before this Court which they never  
6 asserted before the agency or NAD. *Sims v. Apfel*, 530 U.S. 103, 114,  
7 120 S.Ct. 2080, 2087, 147 L.Ed.2d 80 (2000) ("Under ordinary  
8 principles of administrative law, a reviewing court will not consider  
9 arguments that a party failed to raise in timely fashion before an  
10 administrative agency." (Breyer, J., dissenting)); see also *Mahon v.*  
11 *U.S. Dept. of Agriculture*, 485 F.3d 1247, 1254-1257 (11th Cir. 2007)  
12 (arguments not raised at the administrative level in a NAD appeal  
13 proceeding are waived).

14 Second, Defendant argued that Plaintiffs' allegations that FCIC  
15 had no authority to pursue overpayments for crop year 2001 nor to  
16 collect on such overpayments is inconsistent with the evidence of  
17 record. Defendant contends, contrary to Plaintiffs' assertions, FCIC  
18 had every right, by agreement and assignment, to pursue any action  
19 that AGIC could have pursued. Defendant directs the Court's attention  
20 to a January 23, 2003 agreement entitled the "Mandatory Amendment No.  
21 5 to the 1998 Standard Reinsurance Agreement" between AGIC and FCIC.  
22 This agreement set forth additional provisions that would apply should  
23 AGIC be dissolved. In relevant part, the agreement states at page 2,  
24 section 3(a) as follows:

25 The Company assigns to FCIC all of its rights of action to  
26 recover any funds improperly paid under any eligible crop  
insurance contract reinsured under the 2003 or previous  
Agreements. . . .



1 (Ct. Rec. 36-2). Defendant argued that since AGIC was pursuing  
2 overpayments made to Plaintiffs at the time that it was dissolved,  
3 FCIC had the right, by way of the aforementioned agreement and  
4 assignment, to make their own determinations and seek collection of  
5 the amounts overpaid.

6 At the initial hearing on the motions, Defendant raised a third  
7 argument. Defendant claimed that paragraph 5(f) of the insurance  
8 contracts between AGIC and the insured permitted FCIC to reduce the  
9 insured's claim at any time it became clear that the claim was  
10 incorrect or not supported.

#### 11 1. Waiver

12 As noted above, the issue presented in these cases is a challenge  
13 to the agency's jurisdiction to review whether Plaintiffs had been  
14 overpaid by AGIC on their 2001 claims. Objections to jurisdiction can  
15 be raised at any time and are never waived. *Steel Co. v. Citizens for*  
16 *a Better Environment*, 523 U.S. 83, 95 (1998) ("[E]very federal  
17 appellate court has a special obligation to satisfy itself not only of  
18 its own jurisdiction, but also that of the lower courts in a cause  
19 under review" (internal quotation marks and citations omitted)).  
20 While administrative exhaustion requirements are "not jurisdictional  
21 but [are] merely [ ] condition[s] precedent to suit which a defendant  
22 may waive or be estopped from asserting" *Stache v. Int'l Union of*  
23 *Bricklayers*, 852 F.2d 1231, 1233 (9th Cir. 1988), subject matter  
24 jurisdiction may be raised at any time during the pendency of an  
25 action, even on appeal, and are never waived. *Snell v. Cleveland,*  
26 *Inc.*, 316 F.3d 822, 826 (9th Cir. 2002); Fed. R. Civ. P. 12(h)(3) (the

1 Court must dismiss an action if it determines at any time that it  
2 lacks subject-matter jurisdiction). Consequently, the Court finds  
3 that Defendant's argument that Plaintiffs waived the right to assert a  
4 lack of jurisdiction by failing to raise the claim during the  
5 administrative proceeding is without merit.

## 6           **2. Assignment Agreement**

7           Although AGIC and the insured were the only parties to the  
8 insurance contracts (*Olsen, et al. v. United States of America*, 06-CV-  
9 5020-FVS; Ct. Rec. 61 at 5-6), FCIC retained a right, by agreement and  
10 assignment to pursue actions against Plaintiffs that AGIC could have  
11 pursued. As indicated above, on January 23, 2003, an agreement  
12 entitled the "Mandatory Amendment No. 5 to the 1998 Standard  
13 Reinsurance Agreement" between AGIC and FCIC was signed which set  
14 forth additional provisions that would apply should AGIC be dissolved.  
15 At the time of AGIC's dissolution, the crop year 2001 amounts and  
16 overpayments were at issue and, as evidenced above, FCIC received an  
17 assignment from AGIC to pursue "rights of action to recover any funds  
18 improperly paid under any eligible crop insurance contract reinsured  
19 under the 2003 or previous Agreements." Although this document was  
20 not a part of the administrative record, this evidence is  
21 appropriately before the Court on *de novo* judicial review. *See supra*.  
22 Accordingly, FCIC obtained AGIC's rights, by this assignment  
23 agreement, to pursue recovery of alleged overpayments for the 2001  
24 crop year claims.

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1                   **3. Paragraph 5(f)**

2           The insurance policy states in the first paragraph of the  
3 document, "[i]n the event we cannot pay your loss, your claim will be  
4 settled in accordance with the provisions of this policy and paid by  
5 FCIC." Defendant argues that once AGIC was placed in liquidation, the  
6 policies were transferred to FCIC pursuant to this "cut-through  
7 provision" and the Standard Reinsurance Agreement, and FCIC thereafter  
8 acquired the authority to administer the policy in accordance with its  
9 terms. Defendant asserts that Paragraph 5(f)<sup>1</sup> of the insurance policy  
10 provided authority for FCIC to review Plaintiffs' approved adjusted  
11 gross revenue ("AGR") and determine whether it was calculated  
12 correctly. In accordance with Paragraph 5(f), FCIC determined that  
13 Plaintiffs' approved AGR was calculated incorrectly and that  
14 Plaintiffs were required to repay the amount of the overpayment made  
15 by AGIC.

16           The "cut-through provision" in the insurance policy provides that  
17 the insured's claim would be addressed by FCIC, in a manner proscribed  
18 by the policy, in the event AGIC became unable to administer the  
19 claim. Therefore, when AGIC was placed in liquidation, the claims  
20 were transferred to FCIC to administer in accordance with the terms of  
21 the policy. Paragraph 5(f) of the policy indicates that the claim  
22 could be reduced at any time if found to be incorrect. FCIC, having  
23 taken over the administration of Plaintiffs' claims pursuant to the  
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25           <sup>1</sup>Paragraph 5(f) states that "[w]e will reduce your approved  
26 AGR and any indemnity or deny liability at any time we become  
aware that the information used to determine your approved AGR is  
incorrect or is not supported by written verifiable records."

1 "cut-through provision," acted pursuant to Paragraph 5(f) and found  
2 that Plaintiffs' approved AGRs were calculated incorrectly and that  
3 Plaintiffs were required to repay the amount of the overpayment made  
4 by AGIC.

5 The Court finds that Paragraph 5(f) of the policy agreement, in  
6 conjunction with the cut-through provision, as well as the assignment  
7 agreement, authorized FCIC to revise Plaintiffs' claim determinations  
8 and seek the alleged overpayments.

9 **B. NAD Jurisdiction to Review**

10 Plaintiffs next argue that the decisions by AGIC to make payments  
11 to Plaintiffs in 2001 are decisions which NAD had no jurisdiction to  
12 review. Plaintiffs assert that the USDA's own regulations expressly  
13 preclude NAD review of payments made by private insurers to their  
14 insured. 7 C.F.R. § 400.91(b)(2).<sup>2</sup>

15 Defendant responds that Plaintiffs' arguments are flawed.  
16 Specifically, Defendant asserts that AGIC's determinations were not  
17 administratively adjudicated. Rather, the decisions of FCIC were  
18 administratively considered. Defendant agrees with Plaintiffs that  
19 Subpart J of the Act does not apply to determinations made by AGIC.  
20 However, Subpart J does provide for administrative review of "adverse  
21 decisions made by personnel of [FCIC] with respect to . . .  
22 [c]ontracts of insurance of private insurance companies and reinsured  
23 by FCIC." 7 C.F.R. § 400.91(a)(1)(ii). Here, Defendant contends the  
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25 <sup>2</sup>It is undisputed that Subpart J is not applicable to  
26 decisions made by private insurance companies (AGIC) with respect  
to any contract of insurance issued to an insured (Plaintiffs)  
and reinsured by FCIC. 7 C.F.R. § 400.91(b)(2).

1 administrative review process reviewed FCIC's determinations regarding  
2 the 2001 indemnity amounts and overpayment issues, not AGIC's, and  
3 such determinations are properly reviewable under Subpart J of the  
4 Act.

5 **1. Assignment Agreement**

6 A general principle of assignment provides that the assignee  
7 steps into the shoes of the assignor upon assignment of the interest  
8 and takes the assignment subject to the defenses assertable against  
9 the assignor. Restatement (Second) of Contracts § 336 (1981); see  
10 also, 29 Williston on Contracts § 74:47 (4th ed. 2003) ("It has been  
11 held repeatedly that the assignee 'stands in the shoes' of the  
12 assignor . . . ."). Accordingly, FCIC's rights, as an assignee, can  
13 be no different than AGIC's rights as the assignor. By the assignment  
14 agreement, FCIC obtained the right to pursue claims of overpayment  
15 against Plaintiff but could do so only in a manner prescribed in the  
16 contract of insurance between AGIC and Plaintiffs.

17 Paragraph 13(a) of the insurance contracts provides that factual  
18 disagreements between the insured and AGIC will be resolved through  
19 arbitration. As AGIC's assignee, FCIC had the right to bring an  
20 action to pursue overpayments by asserting claims through the  
21 arbitration process. FCIC resisted participation in the arbitrations  
22 brought by Plaintiffs and have thus forfeited that venue for potential  
23 recovery.

24 The Court finds that any argument that the assignment agreement  
25 conferred jurisdiction for NAD review lacks merit. Based on

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1 Defendant's attorney's comments at oral argument, it appears this  
2 argument was abandoned in any event.

3 **2. FCIC Determinations**

4 When AGIC was placed in liquidation, Plaintiffs' claims were  
5 transferred to FCIC to administer in accordance with the terms of the  
6 policies pursuant to the "cut-through provision". Pursuant to  
7 Paragraph 5(f) of the insurance policies, FCIC, acting as the  
8 administrator of the claims, found that Plaintiffs' approved AGRs were  
9 calculated incorrectly and that Plaintiffs were required to repay the  
10 amount of the overpayment made by AGIC. As indicated above, FCIC was  
11 authorized to make these determinations. *Supra*.

12 Here, NAD reviewed determinations regarding the 2001 indemnity  
13 amounts and overpayment issues made by FCIC, not AGIC. Such  
14 determinations are appropriately reviewed under Subpart J of the Act.  
15 7 C.F.R. § 400.91(a)(1)(ii).<sup>3</sup> Paragraph 13(a) of the insurance  
16 contracts also expressly provides that factual disagreements as to  
17 decisions made by FCIC must be resolved through the administrative  
18 appeal process, and not through arbitration. Moreover, Plaintiffs  
19 requested NAD review of these FCIC determinations. Based on the  
20 foregoing, it is clear that NAD had jurisdiction to review the issue  
21 of whether Plaintiffs had been overpaid by AGIC.

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24 <sup>3</sup>While it is undisputed that Subpart J of the Act does not  
25 apply to determinations made by AGIC, Subpart J does provide for  
26 administrative review of "adverse decisions made by personnel of  
[FCIC] with respect to . . . [c]ontracts of insurance of private  
insurance companies and reinsured by FCIC." 7 C.F.R. §  
400.91(a)(1)(ii).

1 While the assignment agreement does not bestow jurisdiction for  
2 NAD review, FCIC acquired the authority to administer the insurance  
3 policy pursuant to the "cut-through provision" of the policy and the  
4 Standard Reinsurance Agreement and made determinations under Paragraph  
5 5(f) of the policies. Because these decisions were made by FCIC, not  
6 AGIC, the matters were appropriately reviewed by NAD under Paragraph  
7 13(a) of the insurance contracts. Therefore, the Court concludes that  
8 NAD had jurisdiction to decide whether Plaintiffs had been overpaid by  
9 AGIC.

### 10 **C. Counterclaims**

11 At the supplemental oral argument on the motions and in  
12 Defendant's supplemental briefing, Defendant also raises a new theory  
13 regarding jurisdiction. Defendant argued that this Court has  
14 jurisdiction over the issue of the alleged overpayments by virtue of  
15 Defendant's counterclaims in this lawsuit. Defendant asserts that  
16 this Court has two lawsuits before it. One is an APA review of the  
17 agency determinations regarding what indemnity Plaintiffs are due for  
18 2001 and 2002. The other is the counterclaims brought by Defendant  
19 seeking recovery from Plaintiffs. Defendant claims that the  
20 counterclaims are separate suits and this Court has jurisdiction over  
21 the counterclaims pursuant to 28 U.S.C. §§ 1345 and 1346(c).

22 Plaintiffs have not moved to dismiss Defendant's counterclaims in  
23 the instant motions. Plaintiffs have simply argued that (1) FCIC did  
24 not, as a matter of law, have authority to revise the claim  
25 determinations made by AGIC, and (2) NAD lacked jurisdiction over the  
26 issue of whether Plaintiffs had been overpaid by AGIC. As indicated

1 above, the Court finds that (1) FCIC did have authority to revise the  
2 claim, and (2) administrative review of the claims by NAD was  
3 appropriate. The Court finds it unnecessary to address Defendant's  
4 counterclaim jurisdictional argument.

5 **IT IS HEREBY ORDERED:**

6 1. Plaintiff Lynn Olsen's motion for partial summary judgment  
7 (**Ct. Rec. 23, 08-CV-5012-FVS**) is **DENIED**.

8 2. Plaintiff Carr Farms, LLC's motion for partial summary  
9 judgment (**Ct. Rec. 20, 08-CV-5013-FVS**) is **DENIED**.

10 3. These matters shall proceed to the hearings on the cross-  
11 dispositive motions currently set for November 10, 2009 at 1:30 p.m.  
12 in Spokane, Washington.

13 **IT IS SO ORDERED.** The District Court Executive is hereby  
14 directed to enter this order in each case (**08-CV-5012-FVS & 08-CV-**  
15 **5013-FVS**) and furnish copies to counsel.

16 **DATED** this 30th day of September, 2009.

17 S/Fred Van Sickle

18 Fred Van Sickle  
19 Senior United States District Judge  
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